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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 313

BERT SMITH,
Petitioner,

v.

J. TURNER BUTLER and WILLIAM A. HALLOWES, III,
As Trustees of the Property of Florida East Coast
Railway Company, a Florida Corporation,
Respondents.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The first opinion (R. 325-329) of the District Court of Appeal of Florida, Third District, is reported at 104 So. 2d 868. The second opinion (R. 368-369) by the same court is reported at 118 So. 2d 237. The order (R. 369) of the Supreme Court of Florida denying certiorari is reported at 122 So. 2d 402.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3). The judgment of the Third District Court of Appeal became final on May 13, 1960, when the Supreme Court of Florida denied certiorari and refused to take jurisdiction in the case (R. 369).

The petition for certiorari was filed in this Court on August 10, 1960. This Court granted the petition and transferred the case to the summary calendar on October 24, 1960 (R. 370).

STATUTES INVOLVED

The pertinent sections of the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U.S.C. Sec. 51, *et seq.*, and the Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. Sec. 151, *et seq.*, are set out in Appendix A.

QUESTION PRESENTED

Did the Florida Appellate Court err in holding that when a railroad employee sustains personal injuries while performing an alleged physical fitness field test ordered by the railroad that the provisions of the Railway Labor Act, 45 U.S.C. Section 151, *et seq.*, preclude him from claiming that the giving of such a test under the facts and circumstances of this case was an act of negligence under the Federal Employers' Liability Act, 45 U.S.C. Section 51, *et seq.*?

STATEMENT OF THE CASE

Petitioner, a railroad flagman, fell and received injuries which totally and permanently disabled him in 1956 (R. 82-86). The events leading to his downfall are unique.

In 1956, respondents urged petitioner to retire. He refused (R. 33-34, 59-60, 152). At that time, petitioner was sixty-one years old (R. 135); 5' 3" tall (R. 87); and weighed about 260 pounds (R. 78, 88). He had rendered respondents thirty-six years of continuous service without a single demerit (R. 39, 135, 142-143, 232-233). Although his stamina and agility were impaired by arthritis and his portly physique, he was declared physically "fit for duty as a flagman" by the railroad's local doctor in Miami in August of 1956 (R. 27-28). This medical opinion was shared by respondents' chief surgeon who exaamined petitioner on September 10, 1956 (R. 75-77).

Respondents did not acquiesce in petitioner's retirement refusal. On September 13, 1956, petitioner became the first employee ever required to take a physical fitness "field test" in the history of respondents' railroad (R. 32, 43-44, 66, 69, 74, 101). Respondents' supervisor who ordered petitioner to retire or take the test admittedly devised a test which he believed petitioner was physically unable to perform (R. 65, 67-68).

The "field test" in question required the 260 pound petitioner to walk a mile of track on a hot, humid day (R. 103, 119-120, 158-159) at a place described by one of respondents' conductors as follows:

> "They could have picked the whole railroad and never have picked a worse spot to have had a man walk than they did." (R. 247).

The portion of the track selected was littered with pieces of wire and covered with rocks and weeds (R. 247-248, 160). After walking some 1,000-1,500 feet, petitioner became entangled in a piece of wire and fell (R. 102, 115-116, 138). During the next 1,500 feet, he fell a second time on more wire; and finally fell a third time to rise no more (R. 102-103, 138-139). Even though petitioner was rushed to a doctor and received immediate medical attention (R. 103-104), the series of falls rendered him totally and permanently disabled (R. 82-86).

Petitioner sued respondents under the FELA setting out eight separate allegations of negligence (R. 1-2). The first two allegations of negligence were:

> "a. In negligently and unlawfully requiring the plaintiff to participate in such a 'field test';
>
> b. In negligently allowing its servants, agents or supervisors to conduct such a 'field test';" (R. 2).

The remaining six charges concerned failure to provide a reasonably safe place to work (R. 2).

At the trial, respondents contended that their right to give the test, or the manner in which it was given, could not be questioned in a FELA action and that petitioner could only complain of the matter in proceedings under the Railway Labor Act. The trial judge rejected this contention (R. 65-66, 187-189), and the case was tried accordingly.

Extensive evidence was offered tending to show that the railroad was negligent in requiring petitioner to perform the particular field test in question. Evidence was likewise introduced to show that the test was actually designed to force retirement rather than to determine petitioner's fitness as a flagman.

Among other things, petitioner's evidence showed that:

1. No other employee had ever been required to take such a test in the whole history of the railroad (R. 32, 44, 66, 73-74, 101);

2. For reasons best known to respondents, petitioner was told to either retire or take the test (R. 33-34, 59-60, 152). Until this ultimatum, respondents had always left questions of physical fitness to its medical department. A sick employee could not return to work until the medical department gave him a "fit for duty" slip called a "C. S. 1" (R. 25-26, 67-70); and respondents' supervisors could order a physical examination of any working employee whose fitness was questioned (R. 31-32). The supervisor who ordered the "field test" did not require petitioner to take a physical examination for the admitted reason that he knew the medical department considered petitioner fit for service (R. 34).

3. The particular test given was one which respondents' supervisor admittedly believed petitioner was physically unable to perform (R. 65, 67-68).

4. It was not necessary for flagmen, such as petitioner, to walk a mile in performing their duties and the field test devised was not a true test of a person's ability as a flagman (R. 18-22, 44-45, 51-52, 64-65, 225-228, 254-255).

After all the evidence was in, the trial resulted in a $30,000.00 jury verdict and final judgment for petitioner (R. 319-320). The exact scope and effect of petitioner's evidence need not be further detailed or discussed because of the holding on appeal—no matter what the evidence, petitioner could not question respondents' right to give

him the test. The District Court of Appeal, Third District, reversed petitioner's jury verdict and judgment with a holding that:

> "* * * There was no justiciable issue, at least under the Federal Employers' Liability Act, that could be raised as to the propriety or right of the appellant to give the test. If the appellee were aggrieved, he had a remedy for such grievance under the Railway Labor Act, 45 U. S. C. A., Sec. 151 et seq. Consequently, we do not consider that items 1 and 2 under the charge of negligence, supra, constituted triable issues. * * *" 104 So.2d at 869-870.

The case was remanded to the trial court for retrial on the remaining six allegations of negligence. At this stage of the proceedings, the Florida appellate court's holding was not subject to review by this Court because no final judgment had been entered. *Lavender* v. *Kurn*, 329 U. S. 762; 28 U. S. C. Sec. 1257 (3).

The events which occurred on remand and on the second appeal of the case are succinctly summarized in the Third District Court of Appeal's second opinion in the case:

> "This cause appeared before this court upon a prior appeal. See Butler v. Smith, Fla. App. 1958, 104 So. 2d 868. Upon the return of the cause to the trial court pursuant to our mandate, the plaintiff elected to stand exclusively upon his claim, under the Federal Employers' Liability Act, 45 U.S.C.A. Sec. 51, et seq., that the railroad had no right to give the field test. The trial court entered judgment under authority of our prior opinion in this case. The plaintiff now appeals from this judgment. The only assignment of error presented is that the court erred in directing a verdict for the defendants. Appellant's brief recites 'The sole purpose of this appeal is to

obtain a record on which this court's prior decision in Butler v. Smith, Fla. App. 1958, 104 So. 2d 868, can be reviewed by the Supreme Court of the United States.'

'The judgment of the trial court is affirmed upon the authority of Butler v. Smith, supra.

Affirmed." (118 So. 2d 237).

After the Third District's affirmance of the directed verdict for respondents, petitioner sought review in the Supreme Court of Florida. The Florida Supreme Court denied certiorari on May 13, 1960.

SUMMARY OF ARGUMENT

The decision below is the first to hold that the Railway Labor Act limits the FELA concept of negligence. Such a holding is:

1. Contrary to all-inclusive wording used by Congress in the FELA;
2. Not supported by any language of the Railway Labor Act;
3. Contrary to the holding in the *Barnes* case and in conflict with one theory of recovery approved in the *Borkovic* case; and
4. Contrary to this Court's constant and established course of liberal construction accorded the FELA.

ARGUMENT

The theory that the Railway Labor Act limits the FELA concept of negligence originates with the decision below. No authority is cited to support this radical proposition for the simple reason that none exists.

The unquestioned purpose of the FELA is to provide railroad employees a monetary remedy for personal injuries caused by the railroad's negligence. This purpose is expressed in the following words:

> "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . . ." (45 U.S.C. Sec. 51).

Until the decision below, it was equally unquestioned that the only purpose of the Railway Labor Act was to establish policies and machinery for the peaceful settlement of labor disputes. The Congressional purpose is stated in the Act as follows:

> "The purposes of the chapter are: (1) to avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly

settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions." 45 U.S.C. Sec. 151(a).

The language Congress used affords no possible support for the holding below that:

". . . There was no justiciable issue, at least under the Federal Employers' Liability Act, that could be raised as to the propriety or right of the appellant to give the test. If the appellee were aggrieved, he had a remedy for such grievance under the Railway Labor Act, 45 U.S.C.A. §151 et seq. Consequently we do not consider that items 1 and 2 under the charge of negligence, supra, constituted triable issues. . . ." 104 So. 2d 869-870.

The suggestion that petitioner should seek redress under the Railway Labor Act for the damages caused by the improper field test is unsound advice. The Railway Adjustment Board does not have the power to award damages for tortious conduct. *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239. Cf. *Union Pacific Railroad Co.* v. *Price*, 360 U.S. 601.

Research discloses only one case where it was even contended that the Railway Labor Act limited the issues in a FELA case. In *Barnes* v. *Public Belt R. R. Commission* (E. D. La., 1951), 101 F. Supp. 200, a switchman was injured when a train made a sudden stop. He sued under the FELA. The railroad contended "that as to the claim for loss of time this Court is without primary jurisdiction." 101 F. Supp. 201. Judge Wright awarded plaintiff $306.00 damages for his lost wages and squarely rejected the railroad's contention with a holding that:

"Under Title 45, Section 51, United States Code Annotated, this court has jurisdiction of the claim by

plaintiff against his employer for damages suffered by him through the negligence of his employer. The Railway Labor Act, 45 U.S.C.A. §§151-188, has no application to a claim for damages to the employee resulting from the negligence of an employer railroad. Elgin, Joliet & Eastern Railway Company v. Burley, 325 U.S. 711, 734, 65 S. Ct. 1282, 89 L. Ed. 1886; Virginian Railway Company v. System Federation No. 40, 300 U.S. 515, 57 S. Ct. 592, 81 L. Ed. 789; Order of Railway Conductors v. National Mediation Board, et al., 72 App. D. C. 299, 113 F. 2d 531." 101 F. Supp. 203

The Florida holding below is also contrary to the theory of recovery in *Borkovic* v. *Pennsylvania Railroad Company* (W. D. Pa, 1960), 180 F. Supp. 495. Plaintiff, an electrical lineman, recovered a $100,000.00 verdict for injuries received when he fell while climbing a transformer pole. In denying the railroad's post-trial motions, the Court held:

"At the trial plaintiff introduced evidence to establish that his accident was caused by negligence of the defendant in two respects: first, because the pole from which plaintiff fell was in an unsafe condition because it was 'pock-marked with holes' from previous climbing and also because it was not equipped with steps for climbing; and secondly, because plaintiff had been forced to climb the pole on the particular occasion under conditions of undue stress and pressure as a part of a 'time test' ordered by his supervisors for the purpose of attempting to disqualify a fellow lineman. . . .

* * *

Defendant's contention that the evidence was insufficient to support a finding that plaintiff's accident was caused by negligence of the defendant does not require extended discussion. It is true that the Federal Employers' Liability Act imposes liability only for negligence, and that the mere occurrence of an in-

jury to a plaintiff while employed by a railroad does not make the railroad liable. Inman v. Baltimore & Ohio R. Co., 80 S. Ct. 242; Wilkerson v. McCarthy, 1949, 336 U.S. 53, 61, 69 S. Ct. 413, 93 L. Ed. 497. But a review of the record in the instant case satisfies this Court that the evidence justified with reason the jury's conclusion that defendant's negligence played a part in producing plaintiff's injuries. Under the rule laid down by the United States Supreme Court in Rogers v. Missouri Pac. R. Co., 1957, 352 U. S. 500, 506, 77 S. Ct. 443, 1 L. Ed. 2d 493, no more is required to present a jury question under the Act. The defendant's motion for judgment under Rule 50 must therefore be denied.

MOTION FOR A NEW TRIAL

1. The Court cannot agree with defendant's contention that the jury's finding that plaintiff's accident was caused by any negligence of the defendant was against the weight of the evidence. Although the testimony was conflicting, there was ample evidence to warrant a finding of negligence, both because the pole from which plaintiff fell was unsafe for climbing and because plaintiff was subjected to unreasonable risk and danger by the conditions under which he was ordered to climb the pole. There was also sufficient testimony to justify a finding that either or both of these conditions were a proximate cause of the plaintiff's fall. . . ." 180 F. Supp. 497-498

Borkovic squarely holds that the stress and pressure created by a fitness test is a factor for consideration in determining negligence under the FELA. This should be contrasted with the holding below that the railroad's right to give the test could only be questioned by some unspecified proceeding under the Railway Labor Act.

If the problem is approached on a broader plane, it is readily apparent that the decision below is wholly out

of step with the objectives of Congress and the decisions of this Court. In another context (is silicosis an "injury"), this Court stated in emphatic terms that restrictive concepts are not to be read into the FELA:

> "The language is as broad as could be framed: 'any person suffering injury while he is employed'; 'such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier'; 'by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances,' etc. On its face, every injury suffered by any employee while employed by reason of the carrier's negligence was made compensable. The wording was not restrictive as to the employees covered; the cause of injury, except that it must constitute negligence attributable to the carrier; or the particular kind of injury resulting.
>
> To read into this all-inclusive wording a restriction as to the kinds of employees covered, the degree of negligence required, or the particular sorts of harms inflicted, would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this Court." *Urie* v. *Thompson*, 337 U.S. 163, 181-182.

In the present case, petitioner satisfied both the trial judge and the trial jury that his injuries were caused, in whole or in part, by an improperly conducted "field test". Neither reason nor authority exists to justify the appellate holding below that the negligence involved and the damages sustained were matters which Congress made cognizable only under Railroad Labor Act proceedings.

CONCLUSION

It is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A.

Statutes Involved.

The Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U.S.C., Section 51, provides:

"§51. LIABILITY OF COMMON CARRIERS BY RAILROAD, IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO EMPLOYEES FROM NEGLIGENCE: DEFINITION OF EMPLOYEES.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employees; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such com-

merce as above set forth shall, for the purpose of this chapter, be considered as being employed by such carrier in such comemrce and shall be considered as entitled to the benefits of this chapter."

The Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. Sec. 151 et seq., provides in pertinent part:

"§151a. GENERAL PURPOSES.

The purposes of the chapter are: (1) to avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."